

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1920.

No. 3434.

681

MIKE ATHAN AND PETER VELIS, APPELLANTS,

vs.

JOSEPH FERRERO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED AUGUST 9, 1920.

PRINTED SEPTEMBER 23, 1920.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1920.

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MIKE ATHAN AND PETER VELIS, APPELLANTS,

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3434.

MIKE ATHAN et al., Appellants,

vs.

JOSEPH FERRERO.

a Supreme Court of the District of Columbia.

No. 63502. At Law.

JOSEPH FERRERO, Plaintiff,

vs.

MIKE ATHAN and PETER VELIS, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it Remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:

1 *Complaint in the Municipal Court of the District of Columbia.*

Filed March 29, 1920.

In the Supreme Court of the District of Columbia.

No. 63502. At Law.

JOSEPH FERRERO, Plaintiff,

vs.

MIKE ATHAN and PETER VELIS, Defendants.

DISTRICT OF COLUMBIA, ss:

Your complainant, Joseph Ferrero, being first duly sworn according to law, on oath deposes and says, that he is entitled to possession of premises known as No. 717 A Fourteenth Street, Northwest, in the City of Washington, District of Columbia; that the same are

unlawfully detained from him and held without right by the said defendants, Mike Athan and Peter Velis, who had heretofore rented the said premises as tenants under a certain written lease for a term of three years from the grantors of your complainant commencing on the first day of January, 1913, and to expire on the 31st day of December, 1919, and whose tenancy and estate has been determined by a due notice to quit, as provided in said lease; that your complainant is a bona fide purchaser and is now the owner of said premises and desires possession of the same for the purpose of tearing down said premises in order immediately to construct new property thereon for his own use and occupation. Your complainant further says that he has not accepted rent from the said defendant.

Your complainant therefore prays that a summons be issued commanding the defendant to appear and show cause why judgment should not be given against him for the restitution of the possession of said premises and costs of this suit.

GIUSEPPE FERRERO.

Subscribed and sworn to before me this 23rd day of December, 1919.

MAUD FELLHEIMER,
Notary Public, D. C.

[SEAL.]

Summons in the Municipal Court of the District of Columbia.

* * * * *

The President of the United States to the defendant, Greeting:

You are hereby summoned to appear in this Court on the 7 day of Jan. A. D. 1920, at 10 o'clock a. m., to answer the plaintiff's complaint and show cause why judgment should not be given against you for the restitution of the possession of the premises described in the complaint, under oath, filed herein by said plaintiff, besides costs; and in case of your failure so to appear and answer, the suit will be proceeded with as in case of default.

Witness the Honorable Judges of said Court this 23 day of Dec. A. D. 1917.

BLANCHE NEFF,
Clerk,
By R. H. ROLLINS,
Assistant Clerk.

Marshal's Return.

12/24/1919.—Summoned as within directed.

MAURICE SPLAIN,
U. S. Marshal,
By ESKRIDGE,
Deputy Marshal.

3

Judgment.

March 15, 1920.

Judgment for plaintiff for possession of within described property, upon finding of rent commission, & upon finding of this Court that trustees' notice gave right to action for possession, with costs.

M. M. DOYLE.

Judge.

Appeal noted by counsel for defendant.

Certificate of Municipal Court on Appeal.

* * * * *

Date.

Proceedings.

1919.

Attorney- for plaintiff: Darr, Whiteford and Darr.

Attorney for defendant: F. S. Paladine.

- Dec. 23. Sworn complaint and copy issued.
 " 23. Summons and copy issued. Summons returnable Jan. 7, 1920, at 10 A. M.
 " 24. Summons returned "Summoned by personal service."
 1920.
 Jan. 7. Continued subject to call by plaintiff.
 Mar. 6. Motion of plaintiff and findings of Rent Commission filed.
 " 15. Trial, ex parte.
 " 15. Judgment for plaintiff for possession of the within described property, upon finding of Rent Commission, and upon finding of this Court that trustees' notice gave right of action for possession, with costs. (Appeal noted.)
 " 18. Appeal, undertaking on, filed and approved with the Fidelity and Deposit Co. of Md. as surety.
 " 22. Certificate of Appeal and all papers in case filed with Clerk of Supreme Court, D. C., and Appellant notified.

This is to certify, that the foregoing is a true copy of the Docket Entries and of all the proceedings had before the said Court in the above cause, and that the annexed documents are all the original papers filed in said cause.

4 Witness the Honorable Judges of said Court this 22nd. day of March, A. D. 1920.

BLANCHE NÉFF,
Clerk,

By H. M. HULL,
Assistant Clerk.

Costs paid by Plaintiff, \$2.75.

Costs paid by Defendant, \$1.00.

(Endorsed.)

The Clerk will please docket this appeal, enter my appearance, and issue Summons to Appellee.

F. S. PALADINI,
Att'y for Appellant.

Affidavit of Plaintiff Under Rule 19.

Filed March 31, 1920.

* * * * *

DISTRICT OF COLUMBIA, ss:

Joseph Ferrero, being first duly sworn according to law, on oath deposes and says, that he is the plaintiff appellee in the above-entitled cause, wherein Mike Athan and Peter Velis are the defendant appellants; that he claims and is entitled to possession of the store and premises No. 717 A Fourteenth Street, Northwest, in the City of Washington, District of Columbia; that said premises are unlawfully detained from him and held without right by the said defendants Athan and Velis, who had heretofore rented the said premises from the grantors of your affiant under a certain lease commencing on the first day of January, 1917, and expiring by its own terms on the 31st day of December, 1919, said lease providing, among other things, that in the event of a bona fide sale of said property by your affiant's grantors the lessees would vacate the said premises upon thirty days' notice to quit; that said tenancy
5 and estate has been terminated by a due notice to quit, as provided in said lease; that affiant is a bona fide purchaser and is now the bona fide owner of said premises and desires possession of the same for the purpose of tearing down said premises in order to immediately construct new property thereon for his own use and occupation. Affiant further says that he has not accepted rent from the said defendants and that he is entitled to the sum of \$500.00 per month from the 15th day of March, 1920, the same being the date of the entry of judgment in the Municipal Court for the use and occupation of said premises.

Affiant therefore prays that the sum of \$500.00 per month be awarded as intervening damages for the use and occupation and detention of the said property by the said defendants.

GIUSEPPE FERRERO.

Subscribed and sworn to before me this 30th day of March, 1920.

[SEAL.]

MAUD FELLHEIMER,
Notary Public, D. C.

Affidavit of Defense.

Filed April 12, 1920.

* * * * *

DISTRICT OF COLUMBIA, ss:

Mike Athan and Peter Velis, being first duly sworn, depose and say: that they are the defendants in the above entitled cause of action; that they have a just and meritorious defense to the said action, the same being as follows: they deny that the said
 6 premises 717 A Fourteenth Street, are unlawfully detained from the plaintiff and held without right; that on, to wit: the tenth day of February, 1916 they entered into an agreement of lease for the said premises for a period of three years, with Thomas W. Hay, James B. Archar and Charles J. Murphy, trustees of the Columbus Alexander Estate; a copy of the said lease being marked "Exhibit A", attached hereto and made a part hereof; that to wit: September 16th, 1919 the said trustees served upon the affiants a notice to quit, the same reading as follows:

Sept. 16, 1919.

Messrs. Mike Athan and Peter Velis,
 717-A 14th St. N. W.,
 Washington, D. C.

GENTLEMEN:

Having made a bona fide sale of premises number 717 A Fourteenth Street, Northwest, in this City, now occupied by you as tenants by virtue of a lease with the undersigned, as Trustees of the Estate of Columbus Alexander, deceased, dated February 10, 1916, we hereby notify you, in accordance with the terms of said lease providing for the termination of the same upon three (3) days' notice in the event of the sale of said property, to remove from and quit said premises at the expiration of three (3) days from the date of the service of this notice.

Very truly yours,

THOMAS W. HAY,
 JAMES B. ARCHER,
 CHARLES J. MURPHY,
Trustees Estate of Columbus Alexander.

that the time the said notice to quit was served, the sale of the said premises had not been consummated; that the title to the said premises was not delivered to the plaintiff until sometime in September 1919; that the said lease continued by virtue of the Ball Rent Bill Public Number 63-66 Congress, approved October 22nd, 1919, the covenant therein reading:

7 "It is further provided that in the event of the bona fide sale of said property, the party of the second part agree to surrender possession of said premises within three days, upon written notice from the parties of the first part."

having been suspended so long as the said law is in force: that the said notice served by the trustees is legally insufficient to form the basis of the present action; that the plaintiff has never at any time or in any manner whatsoever served upon the defendants a notice to quit and vacate the said premises; that no notice to quit of any nature has been given the defendants to vacate the premises which conforms to the requirements of the said Ball Rent Bill; affiants deny that plaintiff desires possession of the said premises for the purpose of tearing down the same in order to immediately construct new property thereon for his own use and occupancy. The affidavit of the plaintiff sets forth that the sum of Five hundred Dollars (\$500) per month from March 15th, 1920, is the amount claimed for use and occupation under and by reason of second paragraph of Rule 19 of the Supreme Court of the District of Columbia, and your defendants contend that it is not within the province of the plaintiff or the Court, without a jury, to set an arbitrary sum for the use and occupancy of premises; that the question of use and occupation is a question of fact and these defendants are informed, believe and therefore aver that the rate is grossly excessive, being three hundred and eighty Dollars more than the rate on the fourteenth day of March, and that the only inference that can be drawn is that the plaintiff is undertaking to profit excessively by reason of the lack of supply of stores and buildings in the City of Washington, and it is an attempt to make the defendants pay a rent which is unreasonable and unfair, therefore, your defendants submit that the amount for use and occupation for said premises is a question of fact which must, in the nature of the case, be referred to a jury to pass upon. Your defendants again repeat that they are willing and ready to pay two hundred Dollars, per month and costs and are ready upon the Court's order, to pay the money into the registry of the Court for further action in this matter, but deny the plaintiff has a right to fix a grossly excessive and unreasonable increase of said premises. By reason of the facts hereinbefore set forth the defendants say that the plaintiff is not legally entitled to the possession of the premises nor is he entitled to judgment for use and occupation thereof.

MIKE ATHAN.
PETER VELIS.

Subscribed and sworn to before me this 12 day of April, 1920.

[SEAL.]

FRANK J. STRYKER,
Notary Public for D. C.

EXHIBIT "A."

Lease.

This lease made in duplicate this 10th day of February, 1916, by and between Thomas W. Hay, Charles J. Murphy and James B. Archer, trustees of the estate of Columbus Alexander deceased, parties of the first part, and Mike Athan and Peter Velis co-partners, parties of the second part,

Witnesseth: That the parties of the first part have leased and demised, and do hereby lease and demise to the parties of the second part the entire building and premises known as #717-A Fourteenth Street, Northwest, in the City of Washington in the
9 District of Columbia, for a term of three years (3) commencing on the 1st day of January, 1917, and to expire on the 31st day of December, 1919, at and for the annual rental of Fourteen Hundred and Forty Dollars (\$1,440.00) payable in advance to the parties of the first part, their agents and assigns on the 15th day of each and every month in installments of One Hundred and Twenty Dollars (\$120.00) during the continuance of this lease.

And, the said parties of the second part, for themselves, their executors, administrators and assigns have agreed and do hereby agree to take and to hold said premises and building at the said rent for the said term and under the conditions herein set forth, and they hereby covenant and agree for themselves, their executors, administrators, and assigns that they will not sublet or assign said building and premises or any part thereof, or use the same for any business other than a shoe shine, tailor and billiard parlor business without the written consent of the parties of the first part first had and obtained, or use the same for any unlawful or disorderly purpose.

And, the said parties of the second part, for themselves, their executors, administrators and assigns, further covenant and agree that they will pay the said rent as above stated and that they will pay all the bills for gas, electric light and water used upon or chargeable against said premises as the same becomes due and payable; that they will make all repairs and improvements of said building and premises subject to the prior assent and approval of the parties of the first part; that they will keep the said building and premises in good condition and repair during said tenancy and at the expiration or sooner termination of their tenancy no
10 matter at what time or from what cause, they will surrender said building and premises with all the fixtures now belonging or during said tenancy annexed thereto, to the parties of the first part, their heirs or assigns, in good order and repair, ordinary wear and tear and damages by fire excepted.

And, it is further covenanted and agreed among all of the parties hereto, their executors, administrators and assigns, that if any installment of rent herein reserved be not paid at the time agreed upon, although no demand shall have been made for the same or if any of the covenants herein contained be not performed in ac-

cordance with their tenor and effect, then it shall be lawful for said parties of the first part, their agents or assigns, to terminate this tenancy, lease and agreement by a notice in writing of three (3) days, which said notice may be served on the parties of the second part, or their agent, or by leaving a copy of the same on the said premises and at the expiration of the said three days the term of tenancy created by this Lease and Agreement shall forthwith cease and terminate and the said parties of the first part or their assigns may reenter upon said building and premises and take possession of the same and avail themselves of all the remedies of the law now or then in such cases provided without further notice, all other notice in such cases being hereby expressly waived.

And, it is further covenanted and agreed among the parties hereto, for their heirs, executors, administrators and assigns, that no waiver of one or more breaches of any covenant or covenants herein contained, shall be construed as a waiver of the covenant itself, or any subsequent breach thereof; and if under the provision of this Lease and Agreement a three days' summons or notice shall
 11 be served and a compromise or settlement shall be made thereupon, it shall not constitute a waiver of any of the covenants herein contained, or of the Lease and Agreement itself.

And, it is further covenanted and agreed among the parties hereto, for themselves, their heirs, executors, administrators and assigns, that in the event of said building and premises being totally or partially destroyed or damaged by fire, then the rent herein reserved to be paid shall cease until the said building and premises are restored to a tenantable condition by and at the expense of the parties of the first part, or their assigns, and that upon the rebuilding, restoring or repairing of said building and premises to a tenantable condition, this Lease, in its entirety shall attach to such rebuilt, restored or repaired building and premises and remain in full force and effect for the unexpired portion thereof.

Provided further, that the term created by this lease is conditioned upon the continued ownership by the lessors of the demised premises, and the aforesaid lessees hereby covenant and agree, if the lessors succeed in making sale of the said premises at any time after the execution of this lease, that they the said lessees will vacate said premises after three (3) days' notice to quit, and that upon such sale, in good faith, the term hereby created shall forthwith cease and determine.

In Witness Whereof, the parties hereto have set their hands and affixed their seals on the day and year first herein before written.

(Signed)

THOMAS W. HAY, [SEAL.]

CHARLES J. MURPHY, [SEAL.]

JAMES B. ARCHER, [SEAL.]

Trustees.

MIKE ATHAN. [SEAL.]

PETER VELIS. [SEAL.]

Signed, sealed, and delivered in the presence of:
 HARRIET E. ALDEN.

12 DISTRICT OF COLUMBIA, *To wit:*

I, Harriet E. Alden, a Notary Public in and for the District of Columbia, do hereby certify, that Thomas W. Hay, Charles J. Murphy and James B. Archer, trustees, and Mike Athan and Peter Velis, parties to a certain lease bearing date on the tenth day of February, 1916, and hereto annexed, personally appeared before me in said District, the said Thomas W. Hay, Charles J. Murphy and James B. Archer, trustees, and Mike Athan and Peter Velis being personally known to me as the persons who executed the said lease and acknowledged the same to be their act and deed.

Given under my hand and seal this tenth day of February, 1916.

HARRIET E. ALDEN,
Notary Public, D. C.

Motion for Judgment.

Filed June 29, 1920.

* * * * *

Comes now the pl'tff. by his counsel & moves court for judgment in favor of the pl'tff. for want of sufficient affidavit under Rule 19.

DARR, WHITEFORD & DARR,
Att'ys for Pl't'ff.

Supreme Court of the District of Columbia.

Tuesday, June 29th, 1920.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice presiding.

* * * * *

13 Come now the parties hereto by their respective attorneys of record; whereupon, plaintiff's motion filed herein for judgment under Law Rule Nineteen being considered is hereby granted. Wherefore, it is considered that the plaintiff do have and recover of the defendants herein possession of the premises known as No. 717 A Fourteenth Street, Northwest, in the City of Washington, District of Columbia, and recover against said defendants and Fidelity and Deposit Co., of Maryland, surety, his costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing judgment the defendants by their said attorney, in open court, note an appeal to the Court of Appeals; whereupon, the maximum of an undertaking to operate as a supersedeas, is hereby fixed in the sum of Two Thousand Dollars.

Memorandum.

June 29, 1920.—Undertaking on Appeal approved and filed.

Assignment of Errors.

Filed July 6, 1920.

* * * * *

Comes now the defendants, Mike Athan and Peter Velis, by their attorneys, and say that the Court erred as follows in rendering judgment in behalf of the plaintiff on affidavit under rule 19:

1. The Court erred in granting the motion for judgment.
2. The Court erred in holding the Ball Rent Act, 41 Statutes at Large 296, to be unconstitutional.
3. The Court erred in failing to hold the Ball Rent Act, 41 Statutes at Large 296, constitutional.
- 14 4. The Court erred in holding the notice to quit, upon which this action is based, to be legally sufficient.
5. The Court erred in refusing to submit this cause to a Jury for determination on the issue of fact raised as to the plaintiff's good faith.
6. The Court erred in refusing to overrule the motion for judgment.

F. S. PALADINI,
PEYSER & EDELIN,
Attorneys for Def'ts.

Designation of Record.

Filed July 6, 1920.

* * * * *

The Clerk of the Court will certify the following pleadings and papers in the above entitled cause to the Court of Appeals of the District of Columbia:

1. Complaint and summons of the Municipal Court.
2. Certificate of the Municipal Court on appeal.
3. Affidavit of Plaintiff under rule 19.
4. Affidavit of defense.
5. Motion for judgment under rule 19.
6. Order of Court entered June 29, 1920.
7. Memorandum showing bond approved and filed June 29, 1920.
8. Assignment of errors.

FRANK S. PALADINI,
PEYSER & EDELIN,
Attorneys for Defendants.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 63502 at Law, wherein Joseph Ferrero is Plaintiff and Mike Athan and Peter Velis are Defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District. this 13th day of July, 1920.

[Seal of Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.
E. W.

Endorsed on Cover: District of Columbia Supreme Court. No. 3434. Mike Athan et al., appellants, vs. Joseph Ferrero. Court of Appeals, District of Columbia. Filed Aug. 9, 1920. Henry W. Hodges, clerk.

COURT OF APPEALS

DISTRICT OF COLUMBIA

FILED

NOV 4 - 1920

IN THE

Henry W. Rodgers
clerk

Court of Appeals, District of Columbia

OCTOBER TERM, 1920.

—
No. 3434.
—

MIKE ATHAN AND PETER VELIS, *Appellants,*

vs.

JOSEPH FERRERO.

—
BRIEF ON BEHALF OF APPELLEE.
—

CHARLES W. DARR,

ROGER J. WHITEFORD,

SEFTON DARR,

Attorneys for Appellee.

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1920.

No. 3434.

MIKE ATHAN AND PETER VELIS, *Appellants*,

vs.

JOSEPH FERRERO.

BRIEF ON BEHALF OF APPELLEE.

The statement of facts as set forth in appellant's brief is substantially in accordance with the record and does not need repetition here.

Although there are six assignments of error, yet but two are discussed in appellant's brief, and, after all, there is but one question involved, to wit, the constitutionality of the Ball Rent Act.

This Court having already decided that Act to be unconstitutional in the case of *Hirsh vs. Block*, 48 Washington Law Reporter, 378, it would seem to be unnecessary to discuss that question further.

In support of the claim of appellants that it is constitutional, the Court is by the brief of appellants referred to the argument and cases set forth in the brief of appellee in the case of *Hirsh vs. Block*. Those authorities not being sufficient to convince this Court in the case cited, it is difficult to see how they could be of any assistance to the Court in this case. We deem it unnecessary, therefore to discuss the unconstitutionality of the Act in view of the very clear and undoubtedly accurate decision of this Court.

The only other suggestion made in the brief of the appellants is that the plaintiff in the case at bar, having invoked the aid of the Ball Rent Law, can not now suggest its unconstitutionality.

It is interesting to parallel the decision of this Court in the case of *Hirsh vs. Block* and the conclusion in the brief of the appellants. This Court used the following language:

“But plaintiff would be in a poor position to question the jurisdiction which he had himself invoked merely because of an adverse decision. If he should invoke the aid of the statute and *suffer defeat* before the commission, he would estop himself to seek further relief on the ground of the unconstitutionality of the act.”

From this language counsel for the appellants draw this conclusion: “The plaintiff in this case has proceeded to invoke the aid of the statute as appears from the opinion of the Municipal Court and *having obtained benefits of act*, he is estopped to object to its disadvantages.

Plaintiff appellee here did invoke the aid of the statute before the Rent Commission and was successful. The Municipal Court entered judgment enforcing

the finding of the Rent Commission and the Supreme Court of the District of Columbia entered judgment in favor of the plaintiff appellee regardless of the Ball Rent Law, which had at that time been declared unconstitutional. Even if the Ball law were unconstitutional, the plaintiff appellee would still be entitled to judgment for possession.

Appellants' brief directs the attention of the Court to an issue of fact raised in the affidavits, claiming that at the time the notice to quit was served the sale of the premises had not been consummated. The lease in question did not require the notice to quit to be served by the purchaser. It provided that the notice to quit should be served by the trustees. In that event, therefore, it becomes immaterial as to when the sale had been consummated.

The affidavit of defense does not, however, raise an issue of fact but merely draws a conclusion. The notice to quit is dated September 16, 1919, and it is alleged in the affidavit "that the title to said premises was not delivered to plaintiff until some time in September, 1919." If the title was not delivered to plaintiff until after September 15, 1919, why does not the affidavit so state? Certainly no such haphazard allegation in an affidavit raises any issue of fact and the presumption is that plaintiffs' affidavit, that he was a *bona fide* purchaser, is sufficient.

It is respectfully submitted that the judgment should be affirmed.

CHARLES W. DARR,
ROGER J. WHITEFORD,
SEFTON DARR,
Attorneys for Appellee.